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NO. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES R. BALKCOM, WARDEN,
Petitioner,

v.

GUY MASON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
(FORMER FIFTH CIRCUIT)

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eleventh Circuit (Former Fifth) properly vacated the conviction and rejected the harmless error doctrine when a burden-shifting charge was given on the element of intent which was not a disputed issue at Respondent's trial?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Former Fifth) is reported at Mason v. Balkcom, 669 F.2d 222 (11th Cir., 1982). A copy of this opinion is attached

as Appendix "A" to this petition.

The opinion of the United States District Court, Middle District of Georgia, is reported at Mason v. Balkcom, 487 F.Supp. 554 (M.D. Ga. 1980). A copy of that opinion is set forth in Appendix "B."

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit (Former Fifth) was entered on March 1, 1982. See Mason v. Balkcom, 669 F.2d 222 (11th. Cir. 1982).

Petitioner's timely petition for rehearing was denied on April 6, 1982. See Appendix "C".

Petitioner's motion for a stay of the issuance of the mandate, pending the filing and disposition of this petition for writ of certiorari, was granted on April 30, 1982 and extended on June 18, 1982. See

Appendix "D,"

This petition for a writ of certiorari has been filed within the allowable ninety day period and this Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent, Guy Mason, was convicted of murder on January 22, 1975, following a jury trial in the Superior Court of Baldwin County, Georgia. The death sentence was imposed by the jury on the basis of a statutory aggravating circumstance, namely, Respondent's prior conviction of a capital felony (a 1954 murder conviction).

The evidence adduced at trial, as succinctly summarized by the Georgia Supreme Court on direct appeal, was as follows:

> On September 2, 1974, about 12:30 p.m., James Copeland drove Guy Mason (the appellant) and Annie Ruth May (the victim) from their residence to her mother's home. The appellant had two pistols in his possession and gave one of them to the victim. Copeland next saw them at Oscar Davis' Place at approximately 2:30 p.m. that same day in

Baldwin County, Georgia.

The testimony concerning the events occurring in Oscar Davis' Place and in the street immediately preceding the death is to some degree in conflict. Copeland testified that the victim was arguing with several people, including the appellant. There is some indication that appellant wanted to leave Oscar Davis' Place, but the victim was not ready. Subsequently, the victim told the appellant that she was ready to go. Appellant left the Place first followed by the victim.

The victim's mother, Geneva Simmons, testified that she was present at Oscar Davis' Place but saw nothing of any consequence occur between appellant and the victim. Appellant testified that the victim had threatened to kill him while they were there. Mary Lee Curry also heard the victim threaten appellant.

J. L. Hitchcock was less than 100 feet from the appellant and the victim when he observed them walk out to the street. Mr.

Hitchcock had never seen appellant or the victim before. He had an unobstructed view of the couple as they entered the street. Mr. Hitchcock saw that the victim's hands were down by her side and saw appellant pull a pistol from his right pocket and fire at the victim four times. They were facing each other as the victim moved backwards and the appellant advanced.

James Dennis testified that he heard a lady cursing and saw her reach under her sweater and pull out a pistol. At that time the man accompaning the lady shot her. Appellant testified that after they left Davis' Place he had walked ahead two or three steps, when he turned and saw the victim reach into her bosom and bring out a pistol so that the handle, not the barrel, was visible. He then 'went to shooting just like that, how many times I shot I don't know.' Appellant further testified that Linda Diane was also with them when he shot the victim. However, James Copeland testified that Linda Diane was with him in Oscar Davis' Place when the victim was shot.

When the shots were fired, Daisey Mae Powell (the victim's sister) ran into Oscar's Place and stated that appellant had just shot Annie Ruth May. James Copeland ran to the scene and removed the pistol (State's Exhibit No. 4) from the victim's bosom and placed it in his belt. James Dennis testified for the appellant that he saw some man remove the pistol from the victim's hand. Upon arriving at the scene after a call at 3:54 p.m., Officer Thomas Aycock found the victim lying approximately 150 feet from Oscar Davis' Place. She had gunshot wounds in the temple area of her head and the upper part of her right leg.

Appellant surrendered to the sheriff about 5:00 p.m. on September 2, 1974. He entered the Sheriff's office with a pistol in his hand and stated that he had just shot Annie Ruth May.

The pistol allegedly carried by the victim was recovered from a pool room where it had been pawned by James Copeland.

Mason v. State, 236 Ga. 46, 46-7, 222 S.E.2d 339 (1976), cert. denied 431 U.S. 909,

rehearing denied 432 U.S. 911 (1977).

Respondent next sought habeas corpus relief in the state court; however, that proceeding was held in abeyance while Respondent pursued an extraordinary motion for new trial. The trial court's denial of that motion was affirmed on appeal by the Georgia Supreme Court. Mason v. State, 239 Ga. 538, 238 S.E.2d 79 (1977), cert. denied 434 U.S. 1088, rehearing denied 435 U.S. 981 (1978).

An evidentiary hearing on Respondent's petition for writ of habeas corpus was conducted; relief was denied by the state habeas court. Mason v. Hopper, No. 76-218 (Sup. Ct. of Tattnall County, July 13, 1978). The Georgia Supreme Court denied Respondent's application for a certificate of probable cause to appeal on October 3, 1978.

Subsequently, Respondent instituted the present proceedings pursuant to 28 U.S.C.A. § 2254, raising six grounds of constitutional error each having been previously presented and rejected in the various state court proceedings. By judgment and order dated April 7, 1980, the district court dismissed the petition for writ of habeas corpus, finding, in part, that the challenged instructions on intent and malice were violative of this Court's decision in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) but that any error arising from the improper instructions was harmless because malice or the intent to kill was not an issue at Respondent's trial.

Finally, Respondent pursued an appeal to the United States Court of Appeals for the Eleventh Circuit (Former Fifth). The Court concurred with the district court's

finding of Sandstrom error, however, the Eleventh Circuit reversed the lower court's determination of harmlessness, finding that the issue of intent to kill remained a viable issue despite Respondent's reliance on self-defense.

Petitioner's request for rehearing was denied by the Eleventh Circuit on April 6, 1982.

REASONS FOR GRANTING THE WRIT

THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (FORMER FIFTH) IMPROPERLY REJECTED THE HARMLESS ERROR DOCTRINE, AS IT HAS BEEN APPLIED BY OTHER FEDERAL COURTS OF APPEALS, IN CASES WHERE A BURDEN-SHIFTING CHARGE WAS GIVEN ON AN ELEMENT NOT AT ISSUE.

Petitioner maintains that the United States District Court for the Middle District of Georgia properly determined that any error, arising from the trial court's instructions on intent and malice, was harmless because intent was not an issue at respondent's trial by virtue of the defense's reliance on self-defense.

The District Court and the U.S. Court of Appeals for the Eleventh Circuit both found the following

instructions to be burden-shifting under this Court's decision in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979):

> The law presumes that a person intends to accomplish the natural and probable consequences of his conduct, and where a person uses a deadly weapon in the manner in which such weapons are ordinarily employed to produce death, thereby causing the death of a human being the law presumes an intention to kill.[1]

The District Court concluded that the above-stated charge was harmless

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1/ Trial transcript pp. 147-48; the trial in this matter was conducted in January 1975, over four years prior to the Sandstrom decision.

error on the basis that the sole issue at trial was the "unlawfulness" of the killing, namely, whether the defendant's actions were lawful or justified because he acted in self-defense:

> The petitioner's only defense to the charges was self-defense. He thereby controverted only that the killing was unlawful and done with premeditation and deliberateness. The issue was not 'intent to kill' per se but it was the lawfulness of the killing and of petitioner's intentions with respect thereto. Since the charge of the trial judge clearly imposed on the prosecution the burden of proving unlawfulness, premeditation and deliberateness beyond a reasonable doubt and these were the only disputed issues in the case, this court finds that the erroneous charge was harmless beyond a reasonable doubt and

> thus that the conviction and sentence should not be set aside on this ground. Mason v. Balkcom, 487 F.Supp. 554, 559 (M.D. Ga. 1980).

Circuit Judge Hill, concurring specially in the Court of Appeals' decision, agreed with the district court's harmlessness analysis but was disturbed by the unavailability of trial counsel's closing arguments. Petitioner maintains that reversal is not warranted on the basis that closing arguments were not transcribed because the defense strategy is clearly reflected in the trial transcript itself by the defense's presentation of evidence and cross-examination of state witnesses. Circuit Judge Hill stated:

> The case apparently put to the jury for decision was whether or not excuse or justification was present. The erroneous instruction did not relate to that issue and did no harm to its proper resolution. I respectfully disagree with that part of the panel's opinion, referring to the defense of self-defense, which says ' . . . we cannot say that the unconstitutional presumption was not a contributing factor in the jury's decision to resolve dispute against the petitioner.' The resolution of the self-defense claim would be the same whether the petitioner's intent was to kill, wound or frighten. Mason v. Balkcom, 669 F.2d 222, 228 (11th Cir. 1982).

The decision of the Eleventh Circuit correctly recognized the two circumstances when a burden-shifting charge would constitute harmless error: (1) where the

evidence of guilt is overwhelming,[2] or (2) where the burden was improperly shifted on an element which did not constitute a critical issue in the case.

The applicability of the harmless error doctrine to charges held unconstitutional under the Sandstrom decision, on the basis that the burden was impermissibly shifted on an element not at issue, has been widely accepted by the federal appellate courts. The district court's opinion relied on a pre-Sandstrom decision of the Sixth Circuit, U.S. v. Reeves, 594 F.2d

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2/ The district court did not address this issue.

536 (6th Cir. 1979), cert. denied, 442 U.S. 946, wherein the court concluded that a burden-shifting charge on intent constituted harmless error because the defendant, by presenting an alibi defense, never placed intent at issue. See 594 F.2d at 538. In Burton v. Bergmann, 649 F.2d 428 (6th Cir. 1981), the court further clarified its decision in U.S. v. Reeves, supra:

> Our point was simply that the circumstances of that case - the absence of conflicting evidence regarding the appellant's intent - were more conducive to a finding of harmless error than circumstances in which intent became a critical issue at trial. 649 F.2d at 432 n. 4.

The same reasoning was articulated in Boyer v. Israel, 515 F.Supp. 1369, 1374 (E.D. Wisc. 1981), where the district court held that use of an instruction prohibited by Sandstrom does not require issuance of a writ of habeas corpus:

> . . . (1) if intent was not the central issue at trial, or (2) if intent was the issue but there is nevertheless strong evidence of intent contradicted only by the defendant's incredible assertions to the contrary. (Emphasis added).
>
> In accord: Drinkwater v. Gagnon, 521 F.Supp. 1312 (E.D. Wisc. 1981).

While acknowledging that the defense rested its case on a self-

defense theory,[3] the Eleventh Circuit ruled that raising self-defense does not constitute an admission of the intent to kill and that one could act in self-defense with the intent to kill or with the intent to cause a lesser injury. The flaw in the court's analysis is that it disregards the elements of murder under Georgia law and the facts in this case.

In Georgia, the offense of murder is defined in such a manner as to make "unlawfulness" a separate

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3/ The panel stated: "Although it is clear that petitioner shot and killed the victim, he claimed that he acted in self-defense after he saw the victim reach into her bosom and bring out a pistol." (669 F.2d at 227).

element of the crime:

> (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. . . .
>
> Ga. Code Ann. § 26-1101.

Therefore, the three elements of murder in Georgia are (1) an unlawful act, (2) which causes the death of a human being, (3) committed with malice aforethought.

In Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981), the Fifth Circuit held that, under Georgia law, raising self-defense is a challenge to the prosecution's evidence of unlawfulness:

> The court [in Holloway v. McElroy, 632 F.2d 605 (1980), cert. denied, 451 U.S. 1028] concluded

> that for murder and voluntary manslaugher, unlawfulness, in the sense of absence of excuse or justification, is an essential element of the crime. The court defined this unlawfulness as an absence of self-defense, noting that lawfulness was proved by establishing self-defense. (Emphasis added).
>
> 642 F.2d 161, 164.

Accordingly, when a defense based on self-defense is presented in Georgia, the pivotal issue becomes the element of "unlawfulness." In Holloway v. McElroy, surpa, 632 F.2d at 618, the Fifth Circuit held that the burden-shifting charge on intent was harmless error because "By pleading only self-defense, he voluntarily focused the entire determination of his criminal

culpability on a single question - was the homicide justified?"

The record in this case also supports the district court's conclusion that intent was not an issue. The respondent's testimony, on both direct and cross-examination, gives no indication of his intent at the time of the shooting and defense counsel made no attempt to elicit such testimony, thereby, indicating that intent was not a disputed issue.

Respondent's contention, which the Eleventh Circuit apparently found persuasive, that when acting in self-defense the intent of the actor could vary from an intent to merely wound to the intent to kill is not a

plausible argument in this case. The victim was shot in the head and in the upper thigh at very close range; respondent cannot be heard to contend that he intended only to wound the victim in light of these injuries.[4] In any event, petitioner maintains that Circuit Judge Hill, concurring specially to the Eleventh Circuit's decision, correctly concluded that the resolution of the self-defense claim was an issue entirely independant of whether respondent intended to kill or frighten.

4/ See McGuinn v. Crist, 657 F.2d 1107 (9th Cir. 1981) (Sandstrom error held harmless; four shots to victim's head established "knowingly or purposeful" element of the offense of murder).

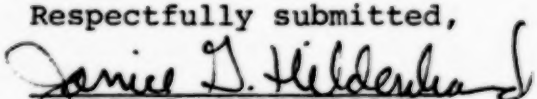
Finally, petitioner maintains that the reasoning employed in Holloway v. McElroy, supra, as well as the district court's opinion is controlling here where the defense's assertion of self-defense necessarily focused the jury's attention on the unlawfulness issue, while intent was not disputed. Petitioner would further note that the reasoning of the district court's opinion, which petitioner's urges as the correct application of the harmless error doctrine in this case, has been specifically cited with approval by the Court of Appeals for the Ninth Circuit in McGuinn v. Crist, supra, 657 F.2d at 1109 and in Ross v. Israel, 503 F.Supp. 131, 134 (E.D. Wisc. 1980).

Therefore, petitioner respectfully requests that the Eleventh Circuit's determination of harmful error, arising from the trial court's instructions on intent and malice, be reversed and that this court adopt the reasoning of the United States District Court.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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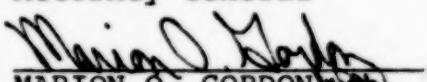

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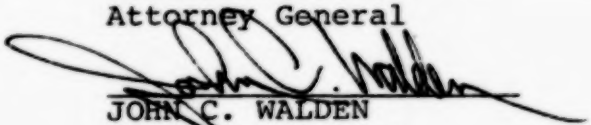

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CERTIFICATE OF SERVICE

I, JANICE G. HILDENBRAND, Attorney of Record for the Petitioner and a member of the Bar of the Supreme Court of the United States do hereby certify that in accordance with the rules of the Supreme Court of the United States I have served two copies of this petition for a writ of certiorari upon the Respondent by depositing the same in the United States mail with sufficient first-class postage affixed thereto and addressed to counsel for Petitioner as follows:

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This 2nd day of July, 1982.

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